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No. 73-39

FILED
JUL 2 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

ANDREW GEORGE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Andrew George, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix to this Petition (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1973. A timely Petition for Rehearing was denied on May 31, 1973 (Appendix B). The jurisdiction of this Court was invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Government proved knowledge and intent on the part of the defendant George of a scheme to defraud Zenith.

2. Whether the Court properly refused the theory of defense instructions.

3. Whether the Court erred in admitting evidence of Zenith conflict of interest policy.

STATEMENT OF FACTS

The indictment charged the defendants with mail fraud (Title 18, U.S.C. §1341) in that the defendant, Greensphan, paid various "commissions and kick-backs" to the defendant, Yonan, through the defendant, George, thereby depriving Zenith 1) its lawful money and property, and 2) the honest performance of Zenith's employee Yonan. (Tr. 13, 593-595). In arguing against the defendant's motion for a directed verdict the prosecutor characterized the fraud involved as Zenith's "loss of Mr. Yonan's honest services, and, secondly through the conversion of secret profits by Mr. Yonan . . ." (Tr. 250).

The evidence taken in the light most favorable to the government proved the following basic facts about the alleged scheme to defraud.

1. Yonan was a buyer for Zenith.

2. Greensphan (Accurate Box Corporation) was a cabinet supplier for Zenith since 1963.

3. During 1967, 1968, 1969, 1970 and 1971 Greensphan supplied over 300,000 cabinets for a Zenith product known as the 'circle of sound'.

4. Zenith paid Greensphan for these cabinets.

5. A & G Woodworking, George's company, submitted various invoices to Greensphan for varying amounts of money in 1968, 1969 and 1970.

6. Greensphan paid these invoices which totaled over $300,000 dollars.

7. George paid over $100,000 to Yonan during 1968, 1969 and 1970.

8. Zenith had a policy against payments by its suppliers to its employees.

These basic facts were supplemented by the following evidence.

Zenith had what it termed a 'product committee' consisting of members of the engineering, sales and purchasing departments. This committee met weekly to discuss and select new models designed by Zenith stylists. After a model was presented, discussed and selected it would then be referred to the engineering department in order that blueprints might be prepared. These blueprints were then sent to various suppliers for bids. (Tr. 53-59, 73-74, 268-270 and 370). The request for bids would also enclose a standard Zenith quotation form with listings for the cost of materials, labor, freight and overhead and disclosure of profit. (Defendant Greensphan's Exhibit 1 (Tr. 76, 288-289, and 373). When a bid is received it would be reviewed by

various members of the purchasing department, including Yonan, Cardis, Yonan's supervisor, Maloney, and the individual buyer, as well as representatives from the engineering and sales departments. (Tr. 58-59, 76-80, 375-376, 392, and 398). The supplier was chosen in these conferences. (Tr. 80). Yonan would then send out the blueprints and, if the price were too high, negotiate it to an acceptable level. (Tr. 73) [1]

In placing a purchase order Zenith would issue what it termed a release which specified the quantity and delivery date of the product ordered. Yonan had nothing to do with this or the figures on it. The decision as to both quantity and delivery date, as well as price, rested with the sales department. Yonan's responsibility was to place the order and follow it through (Tr. 80-82, 292-293). The ultimate responsibility for negotiating bids and purchase orders with cabinet suppliers in 1966, 1967, and 1968 was Maloney's. (Tr. 86-87).

The "circle of sound" orginated in the Zenith engineering department in 1966. (Tr. 268, 429). As originally conceived it was to be a veneer cabinet. However, this proved too costly. (Tr. 404, 429, 368). Zenith tried various ways to make a cabinet according to the original design but were unable to do so and eventually contacted Accurate Box. (Tr. 370 and 427). Bugella and Greensphan met with Maloney and possibly Yonan to discuss the feasibility of this product. Maloney told them the problem Zenith was having and asked them to look into the matter and see if

[1] This was the witness Maloney's (Yonan's supervisory and Zenith purchasing agent until June 30, 1969) definition of "basic and primary responsibility" as used in the Government's questions to him.

they could come up with any ideas or innovations. Maloney wanted to keep the design but lower the costs. (Tr. 368, 370, 429). Accurate invested a great deal of time in working with Zenith engineering in producing a model acceptable to the Zenith sales department. (Tr. 271-272, 282, 370, 430).

Numerous other Zenith suppliers were contacted in regard to the "circle of sound" model. These included MPI Industries, L. Burnham, a wholely owned Zenith subsidiary, Steiger Furniture Co., Igloo Cabinet Company and Modar Company. Each refused to bid on the model as designed by Zenith. (Tr. 377-379, 404, 83-84, 88-89).

In the course of the trial numerous Zenith employees were called to testify. These included Lloyd R. Nanfield, director of purchases; Peter J. Maloney, purchasing agent; Philip E. Teer, senior buyer; Edward T. Kirchner, Jr., buyer; William A. Seibert, senior buyer; Anthony Peter Cassa, field quality manager; Joseph Ferrari, value engineer; Leon Koza, cabinet engineer; Eugene Hoffer, value engineer. Each testified that Yonan never asked them to extend any favoritism or partiality to Greensphan or Accurate Box and that none had been extended. (Tr. 60, 87, 389, 294, 296, 314-316, 326-329, 365, 397, 405-406, 412-413). Maloney, Teer, Ferrari and Koza all testified that the prices charged Zenith by Accurate Box were fair and reasonable. (Tr. 388, 416, 297-306, 397, 405-406). In fact no witness in the entire trial stated that Yonan and/or Greensphan had sought or received any favoritism or partiality. No witness testified that the prices were other than fair and reasonable and competitive. As noted all the testimony was to the contrary.

The only evidence as to Zenith Purchase orders, Accurate bids or price per unit was brought out by the defendants. They established that Zenith usually allowed a supplier a profit of ten percent and that the bids submitted by Accurate Box included a profit margin of less than ten percent. (Greensphan Exhibit 1, 2, 1-A and 2-A; Tr. 76) [2] These bids and/or prices were not inflated in any way to include any payments to Yonan. (Greensphan Exhibit 1, 2, 8, 1-A and 2-A; Tr. 436-437, 465-467, 483-484). In fact the agreements to manufacture these cabinets (circle of sound) had been made long before any payments were made to A & G Woodworking or requested by Yonan. (Tr. 268-276, 367-372, 427-437, 446-458; Defendant Greensphan Exhibits 1, 2, 9, 7). In fact the future tenor of the Zenith-Accurate relationship was set forth in a letter from Greensphan to Maloney dated June 29, 1967 confirming their telephone conversation of that date, six months before any payments to A & G Woodworking. (Greensphan Exhibit 7).

On June 11, 1968 Hoffer a value engineer for Zenith did a value analysis on the "circle of sound cabinet" supplied by Accurate. The figure he arrived at was $28.93. (Defendant Greensphan Exhibit 8, Tr. 412-413). Later that month Zenith placed a purchase order for this cabinet dated June 24, 1968 for $28.38. (Defendant Greensphan Exhibit 9, Tr. 416-417). In addition Mr. John Cardis, purchasing agent in charge of Zenith, directed Philip E. Teer, a senior Zenith buyer, to prepare an analysis of all Accurate bids between 1966 and 1970. As a result of his review of all

[2] The profit was actually less than eight percent since Zenith required a rebate of two percent.

these bids and those of other manufacturers for similar items, Teer concluded that Accurate Box's bids to have been competitive. He also found the purchase orders to have been awarded on the basis of quality workmanship, performance and service. (Tr. 291). He reported these findings to Cardis in a memorandum dated January 21, 1971. (Defendant Greensphan Exhibit 4, Tr. 297-306). He did not know the purpose of this study at the time it was made. As the date indicates the study was made after Zenith was fully aware of the facts involving Yonan and Greensphan.

A. The Government Did Not Prove a Crime.

Courts have long recognized two types of fraud, actual and constructive, and the difference between them. *Shushan* v. *United States,* 117 F.2d 110, 115 (5th Cir., 1941); *Epstein* v. *United States,* 174 F.2d 754, 765 (6th Cir., 1949); *Post* v. *United States,* 407 F.2d 319, 329 (D.C. Cir., 1968) cert. den. 89 S.Ct. 863; *United States* v. *Lichota,* 351 F.2d 81 (6th Cir., 1965) cert. den. 382 U.S. 1027.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE GOVERNMENT PROVED KNOWLEDGE AND INTENT ON THE PART OF THE DEFENDANT GEORGE OF A SCHEME TO DEFRAUD ZENITH

For the purposes of this case, we may assume—whatever the original intent of the mail fraud statute—that the payment of a kickback to secure an actual advantage, or with the intent to do so, is encompassed by the fraud which the statute describes. *Shushan* v. *United States*, 5th Cir. 1941, 117 F.2d 110; *United States* v. *Proctor and Gamble Co.*, D.C. Mass. 1942; 47 F.Supp. 676; *United States* v. *Faser*, E.D. La. 1969, 303 F.Supp. 380. It may even be that the mail fraud statute embodies those schemes wherein an employee is corruptly influenced by the payment of a kickback to give less than his faithful services to his principal, especially where the less than faithful services involve the showing of favoritism to the kickback payer. See *United States* v. *Dorfman*, S.D.N.Y. 1971, 335 F.Supp. 675, 679; *United States* v. *Faser*, E.D. La. 1969, 303 F. Supp. 380, 383.

But in this case—even assuming the lack of the threat to Greensphan—the kickback payment was not tied to any advantage, actual or intended. Moreover such a theory was never advanced or suggested by the Government. Instead the Government argued that the payments here amounted to fraud because, *ipso facto*, they deprived Zenith of Yonan's faithful services and they enabled Yonan to earn "a secret profit."

The theory that the payment of money to the agent of another corrupts the agent and dilutes, in some unexplained manner, his loyalty to his employer is classically expressed as a constructive fraud. Similarly, the receipt of commissions by an employee because of his relationship with his employer, but not at the expense, or to the detriment, of his employer, has also been condemned as a constructive fraud. See *Epstein* v. *United States*, 6th Cir. 1949, 174 F.2d 754, 763-6; *Shushan* v. *United States*, 5th Cir. 1941, 117 F.2d 110, 115.

Apparently because of their recognition that the mail fraud statute does not reach these constructive frauds (*Epstein* v. *United States*, 6 Cir. 1949, 174 F.2d 754; *Shushan* v. *United States*, 5th Cir. 1941, 117 F.2d 110) the prosecution and the Court below hypothesized that Zenith was actually defrauded by the amounts paid A & G/Yonan, because Accurate "could have" reduced its prices to Zenith by those amounts. (Tr. 245, 250) This reasoning, however, ignores the uncontradicted evidence in this case.

It was unequivocally established that Zenith normally permitted its suppliers to earn a 10% profit on goods manufactured for Zenith, and that, in this case, Zenith contracted with Accurate knowing Accurate would be earning that 10% profit.[3] (Tr. 76; Greensphan Exhibit 1) Moreover, these contractual arrangements were established prior to Greensphan's agreeing to pay Yonan any kickbacks; and the same contractual arrangements prevailed after the agreement to pay the kickbacks. (Compare Greensphan Exhibit 1 with Greensphan Exhibit 2.) Thus, the

[3] Actually, Accurate earned less than a 10% profit because, as the purchase orders (Greensphan Exhibits 1 and 2) clearly showed, of a 2% "rebate" allowed Zenith.

argument that Zenith was entitled to a reduction in its price by the amounts which Greensphan paid A & G/Yonan is tantamount to an argument that Zenith would have been entitled to any portion of Greensphan's profit which he spent or wasted foolishly.[4]

The distinction which should be evident from the facts of this case is simply that the monies which Yonan received were not generated at Zenith's expense. Cf. *Post* v. *United States*, D.C. Cir. 1968, 407 F.2d 319, 329; *Epstein* v. *United States*, 6th Cir. 1949, 174 F.2d 754, 766-7. Thus Yonan's receipt of this money can be said to be repugnant to Zenith only from an ethical point of view. Zenith may have discontinued the transactions which generated these commissions had they known about them, but only because Zenith would have objected to the propriety of the situation. Certainly Zenith could not have found room to complain about the fairness of its contracts with Accurate, or about the fact that there had been an overreaching because of the relationship. Compare, *United*

[4] During argument on the defendant's motion for judgment of acquittal at the conclusion of the government's evidence, the prosecutor, when asked by the District Judge his view of *Epstein's* applicability to the instant case, argued that the Robinson-Patman Act (15 U.S.C. 13 (c)) prescribes the payment of commissions by a seller to the purchaser's agent. Whatever the effect of the Robinson-Patman Act on facts such as here, it is clear that the Act does not establish standards for criminal prosecutions, nor does it create an active fraud out of otherwise constructive frauds. If the employer is entitled to monies received by an employee during the course of and in apparent derogation of his employment, it is only because of such Acts or the equitable principles underlying creation of constructive trusts. It is certainly not because the employer has suffered any actual detriment as a consequence of the employee's receipt of commissions.

States v. *Groves*, 2nd Cir. 1941, 122 F.2d 87; *United States* v. *Buckner*, 2nd Cir. 1940, 108 F.2d 921, with *Epstein* v. *United States*, 6th Cir. 1949, 174 F.2d 754. Thus Zenith's asserted potential desire to reduce its prices by the amounts paid Yonan stands on no greater footing than a desire to obtain goods at the lowest possible price—even if it means that the manufacturer is earning no profit: the cheaper the price, the happier Zenith would have been; but Zenith's happiness is not the aim of the mail fraud statute.

The argument that the payment of commissions to Yonan deprived Zenith of the honest and faithful performance of his duties deserves scant attention. Again, we emphasize the Government's failure to show that Greensphan sought or that Yonan obtained or attempted to obtain any advantage for Greensphan, whether in derogation of Zenith's interests or not. That Zenith was deprived of the faithful performance of Yonan's duties merely because he received money from Greensphan, without more, is a fiction created by principles of equity which are inappropriate to be fastened onto the criminal law.[5] The germ of the concept may have emanated from *United States* v. *Proctor and Gamble Co.*, D.C. Mass. 1942, 47 F.Supp. 676, where the District Judge, in ruling upon the defendants' demurrers to an indictment charging mail fraud by reason of bribes to employees who thereafter obtained and turned over to the defendants their employer's business secrets, said:

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[5] We have complained in Point 2, *infra*, that the trial judge erred in instructing the jury that "to knowingly tamper or interfere with an employer-employee relationship for the purpose of and with the intent of depriving the employer of the employee's honest and faithful performance of his duties for the employer, may constitute a fraud within the meaning of the mail fraud statute." (Tr. 680)

> "When one tampers with that relationship [of employer and employee] for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right. The actual deception is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interests." (47 F.Supp. at 678)

The importance however of the phrase "for the purpose of causing the employee to breach his duty" is developed by the next succeeding sentence in Judge Sweeney's opinion:

> "The employee, in using the employment relationship for the express purpose of carrying out a scheme to obtain his employer's confidential information and other property, as alleged in the indictment, would be guilty of deliberately producing a false impression of his employer in order to cheat him. Such conduct would constitute a positive fraud * * *". (47 F. Supp. at 678)

The Record in this case is completely devoid of evidence of such a purpose underlying the payments of Yonan.

The insufficiency, and indeed confusion, of the government's case is further illustrated by its position as to the defendant Greensphan's testimony. Greensphan testified in his own defense that in October, 1967 Yonan demanded $1.00 per cabinet on the "circle of sound". As to why he agreed to pay these monies he stated "(B)ecause I was afraid that I was going to lose the business." (Tr. 458). Up to this point there had been no explanation as to why the alleged payments to Yonan were being made.[6] In its

[6] Calvin Kahn testified only that the Accurate checks to A & G Woodworking were commissions on sales to Zenith.

argument the government used this explanation for the payments but argued it was not extortion.[7] In doing so, it stated that Greensphan was buying Yonan's services and establishing an employer-employee relationship. (Tr. 659, 662, 664-665). What services? There was no evidence of any services performed by Yonan for Greensphan. Nor was there any evidence that Greensphan was purchasing any services. In fact the evidence was exactly the opposite. This gross misstatement of the evidence was not only prejudicial, but is indicative of the inherent weakness of the government's case. *This inconsistency was heightened when at sentencing the government characterized the defandant Greensphan's testimony concerning the conversation in October, 1967 as ". . . the substantial truth. . ."*

But what of George's participation and any evidence of *his* specific intent to defraud Zenith, a necessary element of the crime charged. *United States* v. *Rabinowitz,* 327 F.2d 62, 77 (6th Cir., 1964). Within the theory of the government's case, George was allegedly the conduit for payments by Greensphan to Yonan. In its argument to the jury George's participation was characterized by the government as follows:

> "Let's move on to the defendant George; the defendant George helped to make this scheme work. He made the false representations pay. He made—he provided the conduit for the money. He was the intermediary to cover the tracks of Mr. Yonan and Mr. Green.

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[7] Extortion of course would have been a complete defense to the charge of this indictment, not only to Greensphan, but also to the defendant George. See: D.G.Br. p. 28-30.

> A & G Woodworking, if you look at the books and records of Mr. Green's corporation, he has the checks payable to A & G Woodworking. Who is A & G Woodworking?
>
> And then after the money gets in to A & G Woodworking Mr. George forwards, some of it at least at this particular time; how much was provided we don't know. The evidence supports at least $100,000 in checks. He was Yonan's bag man.
>
> Andrew George didn't do anything for the money he received. Nothing legitimate, that is.
>
> Then there is Mr. Green's additional testimony about $3,000 in cash he paid to George personally at the currency exchange on Rush Street." (Tr. .....)

The opinion, recognizing the essential element of intent to defraud Zenith states:

> "He (George) must have known Yonan's position at Zenith and the relationship between Yonan and Greensphan." (O.P.9).

This is, of course, an inference as the language would imply. There is no direct evidence that George knew of Yonan's employment at Zenith or his relationship to Greensphan or of Zenith's "conflict of interest" policy. The opinion then goes on to draw the additional inference that George, knowing those facts,:

> ". . . must have known that some actual injury to Zenith was the reasonably probable result of this scheme." (O.P. 9-10).

Thus the opinion has allowed George's guilt to rest upon an inference based on an inference. It is axiomatic that an inference may not be based on an inference, but must

be based on a fact directly proven. *United States* v. *Russo*, 123 F.2d 420 (3rd Cir., 1941). In this case that is exactly what has occurred.

The opinion, in attempting to bolster this alleged connection between George's payments to Yonan and Greensphan's commissions from Zenith states:

> "That George's payments to Yonan had their source in Greensphan's commission payments to George is shown by Yonan's call to Greensphan's accountant asking about the commission sums paid to George by Greensphan and by Yonan's checking the shipping quantities on an A & G invoice with Greensphan's plant superintendent." (O.P. 9).

Thus George is being made accountable for Yonan's acts which were completely unknown to him. In fact there is no proof whatsoever to connect George's payments to Yonan with Greensphan's commissions from Zenith. Thus in order to connect George to the alleged scheme or joint venture the opinion has used Yonan's acts and statements. It is well settled that an individual may only be shown to be part of a joint venture by his own acts and statements. It is only after having been shown to be a member of such an enterprise that the acts and statements of his coventurers may be used against him. The necessity of the Court's wrongful attempt to connect George to the scheme is itself illustrative of the insufficiency of the government's case.

If in fact this was a scheme designed to defraud Zenith and George was merely a conduit, why did George keep two-thirds (2/3) of the monies? Can this Court ignore and thereby allow the jury to ignore the obvious, namely that bagmen and/or conduits do not keep two-thirds (2/3) of an illicit gain. Furthermore it was uncontested that George fully reported these monies on his respective income tax returns (Tr. 713).

Counsel for defendant George is reminded that at oral argument the question was asked whether in either case George was a "bad man". The charge is mail fraud and no other. The government is required to prove that charge beyond a reasonable doubt.[8] This requires proof of George's specific intent to defraud Zenith, not equivocal proof establishing that George *might* have obtained something for nothing.

The defendant recognizes that this Court in considering arguments addressed to the sufficiency of the evidence must take the evidence in the light most favorable to the government. However, this general rule of appellate review does not mean that the Court may ignore the evidence as whole. In this case the government's evidence, at best, strained in attempting to establish George's guilt. In no way can it be said to have been sufficient beyond a reasonable doubt. That the jury found him guilty is easily understood in light of the fact that the trial court, and now this Court, refused to give a theory of defense instruction, allowed the jury to consider the Zenith "conflict of interest" policy of which he had no knowledge, allowed the jury to make inferences on inferences, and in allowing the jury to consider the acts and statements of his co-defendants against him when there had been no showing he was a member of a joint venture or knew of its objectives.

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[8] The defendants George and Yonan were defended in the trial by the same counsel, not George's present counsel, and it is obvious from a review of both the government's and the defendant's arguments that the evidence and lack of evidence as to George was ignored. Although no argument could have been made as to effective assistance of counsel it is obvious that the strategy at trial benefited Yonan rather than George. In making this observation George refers the Court to the colloquy between George and the court at the time of sentencing (Tr. 699-731).

II.

WHETHER THE COURT PROPERLY REFUSED THE THEORY OF DEFENSE INSTRUCTIONS

The question of whether a defendant in a criminal case is entitled to an instruction reflecting his theory of defense is not new. It is axiomatic that he is, yet the government persists in objecting to such instructions, the trial courts continue to refuse them and reviewing courts continue to say they must be given. *United States* v. *Vole*, 435 F.2d 774, 776 (7th Cir., 1970); *United States* v. *Grimes*, 413 F.2d 1376, 1378 (7th Cir., 1970); *United States* v. *Phillips*, 217 F.2d 435 (7th Cir., 1954); *United States* v. *Bessesen*, 445 F.2d 463 (7th Cir., 1971); *United States* v. *Megna*, 450 F.2d 511 (5th Cir., 1971).

The evidence in this record which supports the requested instructions is substantial. Greensphan's uncontradicted testimony detailing the threats to his business made by Yonan (Tr. 447-53), and the resultant fears which motivated the payments (Tr. 452, 458), were corroborated by denials by eight witnesses of knowledge of any favoritism shown him by Yonan or Zenith as a result of the payments. The payments were demanded and agreed upon at least eight months after Greensphan had bid on and received the Circle of Sound contract. The Government introduced no evidence which tended to show any advantage gained by Greensphan as a result of the payments. In fact at sentencing the government characterized the defendant Greensphan's testimony concerning the conversation with Yonan in October 1967 as ". . . the substantial truth". (Tr. 723)

Greensphan submitted two "theory of defense" instructions.[9] The government objected to B without stating any reason or authority. The court sustained the objection stating it is "a good argument for the jury" (Tr. 556). As to C the government merely stated, "it is, again, a matter of argument".[10] The court said, "(W)ell, this is, again,

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[9] Greensphan's tendered instruction B read:

"The defendant has offered evidence that he paid sums of money to Mr. Yonan as a result of his fear that Mr. Yonan would wrongfully deprive him of business to which he was rightfully entitled, and that these payments of money were not made with the intention or to defraud the Zenith Radio Corporation or its subsidiaries. In determining whether the defendant acted as a result of his fear that Mr. Yonan would wrongfully deprive him of business to which he was rightfully entitled, or with an intent to defraud the Zenith Radio Corporation and its subsidiaries, the jury should consider all the facts and circumstances in the case. If the jury finds that the defendant acted upon the fear that he would be wrongfully deprived of business to which he was rightfully entitled, he should be found not guilty." (R. 55)

[10] His tendered instruction C read:

"It is the defendant Greensphan's theory of the case that the payments which he made to Peter Yonan were induced by the fear that Mr. Yonan would wrongfully take from him contracts to construct cabinets for the Zenith Radio Corporation and its subsidiaries to which he was rightfully entitled.

"Further, it is the defendant Greensphan's theory of the case that the payments which he made to Mr. Yonan were not intended to defraud the Zenith Radio Corporation or its subsidiaries by inducing Peter Yonan to award contracts to Mr. Greensphan which the Zenith Radio Corporation would not otherwise have awarded to Mr. Greensphan.

"Further, it is the defendant's theory of the case that the payments which were made to Mr. Yonan were not intended to defraud the Zenith Radio Corporation or its subsidiaries by inducing Peter Yonan to show favoritism or partiality to the defendant Greensphan." (R. 55)

a restatement of your argument" (Tr. 557). This Court disposed of defendants' arguments concerning the refusal of this instruction in the following manner:

> "Greensphan's 'theory of defense', to the extent it was valid and supported by evidence was adequately safeguarded because the instructions given as to intent, 'knowingly' and 'willfully' as used in the two statutes specified in the indictment permitted the jury to accept the hypothesis that Yonan's economic pressure negatived Greensphan's intent to harm Zenith. Its choice not to do so was supported on this record."[11] (O.P. 10).

In *United States* v. *Phillips*, 217 F.2d 435, 443 (7th Cir., 1954) this Court quoted an earlier D.C. Circuit opinion and stated:

> ". . . in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, *even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.*"

This maxim has been reaffirmed and quoted continuously since. *United States* v. *Grimes*, 413 F.2d 1376, 1378 (7th Cir., 1969); *United States* v. *Vole*, 435 F.2d 774, 776 (7th Cir., 1970); *United States* v. *Bessesen*, 445 F.2d 463, 467 (7th Cir., 1971). Contrary to these precedents this opinion makes a feeble attempt to discount and explain away the evidence[12] and then concludes that the instructions as to

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[11] The government acknowledged the truth of Greensphan's testimony and his lack of an alternative, when faced with Yonan's demands (Tr. 723).

[12] Evidence which the government characterized as the "substantial truth". (Tr. 734).

intent, knowingly and willfully adequately ". . . permitted the jury to accept the hypothesis that Yonan's economic pressure negatived Greensphan's intent to harm Zenith". Thus the opinion ignores the thrust of the above authorities and focuses instead on whether the instructions as a whole permitted the jury to accept defendants' theory. In other words, as long as the instructions do not affirmatively *preclude* his "theory of defense" no error exists. Such is not the law in this Circuit.

The error in refusing this instruction was especially important since the court gave instructions submitted by the government which summarized its theory of the case. This instruction encompassed the theory that it was unlawful to "tamper or interfere with an employer-employee relationship for the purpose of and . . . intent of depriving the employer of the employee's honest and faithful (services)". In a case which the trial court described as close the defendant George was severely prejudiced by the failure to give Greensphan's requested "theory of defense" instruction.

III.

WHETHER THE COURT ERRED IN ADMITTING EVIDENCE OF ZENITH CONFLICT OF INTEREST POLICY

The witnesses *Nanfield and Maloney* were questioned by the Government concerning Zenith's policy "with respect to employees of the Purchasing Department accepting gifts or things of value from a supplier". Each stated Zenith had a "conflict of interest policy" prohibiting such gifts. Nanfield testified this policy was made known to suppliers in letters sent to them annually and that from checking his files he knew Greensphan was addressed a

letter in 1970 and 1971. (Tr. 43-45). Nanfield and Maloney testified that all Zenith employees were required to acknowledge this policy in writing. (Tr. 43, 70-72). The witness Denton testified that Yonan's personnel file contained two such acknowledgments. (Tr. 174-176). All defendants objected to this evidence and the following colloquy then took place.

> "Mr. Lydon: I propose to show some knowledge on the part of Mr. Yonan and Mr. George—or Mr. Green, I should say.
>
> The Court: Well, on your representation that there will be some evidence—." (Tr. 41).

The Court admitted the testimony and subsequently the letters to the Zenith suppliers and employees, Government Exhibits 6 and 7 respectively. (Tr. 45-46, 176).

As noted by the Court's opinion this evidence was received as to the defendants Yonan and Greensphan since "the trial testimony went to connecting the policy with Yonan and Greensphan *only.*" However, the trial court gave a joint venture instruction allowing, as this Court's opinion also allows, the jury to use that evidence against George, ". . . if the jury found the existence of a joint venture and if in furtherance thereof".

This rather simple disposition of the issue ignores two important circumstances. One, the government offered this evidence *only* as to Greensphan and Yonan (Tr. 41). This is apparent when the government in offering the particular exhibit applicable to Yonan stated, "Your Honor, we are *only* offering it as to Defendant Yonan" (Tr. 174). There was no attempt by the government to enlarge its applicability of this particular evidence to George, yet the instruction wrongfully allowed the jury to do this.

Secondly, the Court precluded George from discussing the instruction generally and this evidence specifically with the jury. When attempting to discuss this instruction and the evidentiary implications, the following occurred:

> "I mention that because it will necessarily, in speaking of the evidence, to remind you, jurors, that evidence that Judge Decker may rule competent as to one defendant might be admissible to another. What I mean by this is, there is evidence in this case in which Judge Decker has ruled that it is admissible only to one defendant and that defendant is Irving Green.[13]
>
> The Court: Well—
>
> Mr. Lydon: Your Honor, I'm going to object.
>
> The Court: I told the jury, and let's make this very clear, I told them that, subject to the instructions that they will receive at the close of this case, and that was a tentative ruling only, and the jury will receive an instruction—and, counsel, you received a copy of it, that—
>
> Mr. Frank Whalen: Yes, your Honor.
>
> The Court: And, subject to that instruction, and it is going to be up to the jury to determine whether the evidence applies to all defendants or to only one defendant, and there is no ruling by the Court, the jury will make that determination on the basis of all of the evidence in the case, subject to the Court's instruction". (Tr. 612-613).

As noted, this evidence was offered only as to the defendants Yonan and Greensphan. No motion was ever made by the government to enlarge its application to the defendant George. Yet when counsel for George attempted to discuss with the jury this evidence in the context of the court's previous rulings and in anticipation of the

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[13] Green is Greensphan.

court's instruction, he was stopped. Considered in the light of the government's theory of the case, the above circumstances take on added importance. The government's theory was that the "only relevant defense fact they (the defendants) could have urged, however, was that Zenith knew and approved of their arrangement, a fact, as evidenced by this policy, not available to them." (G.Br. 32). What of George?

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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